84-738

Office - Supreme Court, U.S.
FILED
OCT 30 1984
ALEXANDER L. STEVAS
CLERK

No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HERBERT F. MOORE,

Petitioner,

v.

SARAH T. MORROW, INDIVIDUALLY AND AS SECRETARY OF N.C. DEPARTMENT OF HUMAN RESOURCES; THE N.C. DEPARTMENT OF HUMAN RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SNYDER, LEONARD, BIGGERS, & DODD, P.A.
Attorneys at Law
274 Merrimon Avenue
Asheville, N.C. 28801
(704) 255-0456

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

60pp

QUESTION PRESENTED

1. Whether the comments of the director of a state supported institution about the personnel policies of the Governor of North Carolina fall within the parameters of protected speech as defined by this Court in Pickering v. Board of Education, 391 U.S. 56, (1968) and Connick v. Myers, _____ U.S. _____ (1983)

TABLE OF CONTENTS

Opinions below 2

Jurisdiction 2

Constitutional Provisions Involved ...3

Statement of the Case 4

Reasons for Granting the Writ 10

Conclusion 20

Appendix A 1a

Appendix B 3a

Appendix C 16a

TABLE OF AUTHORITIES

Cases:
Connick v. Myers, ____ U.S. ____, 103 S.Ct. 1684 .....(i)
Cooper v. Johnson, 590 F. 2d 559 9
CSC v. Letter Carriers, 413 U.S. 548 13
Gieringer v. Center School District No. 58, 477 F.2d 1164 16
Leonard v. City of Columbus, 705 F. 2d 1299 17
McKinley v. City of Eloy, 705 F.2d 1110 17
Pickering v. Board of Education 391 U.S. 56 .....(i)
Constitutional Privisions:
First Amendment, U.S. Constitution 3
Fourteenth Amendment, U.S. Constitution 3
Statutes:
42 U.S.C. 1983 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

HERBERT F. MOORE,

Petitioner,

v.

SARAH T. MORROW, Individually

and as Secretary of N.C.

Department of Human Resources;

THE N.C. DEPARTMENT OF

HUMAN RESOURCES

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Herbert F. Moore, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on July 5, 1984, with rehearing denied August 1, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit and U.S. District Court for the Western District of North Carolina are unpublished. They are reprinted in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 5, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 1, 1984. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment XIV. Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a civil action brought by the Petitioner against the Respondents. Petitioner seeks injunctive relief and monetary damages for violation of his civil and constitutional rights under the First and Fourteenth Amendments and 42 U.S.C. 1983.

The Petitioner, Herbert F. Moore, was employed by the North Carolina Department of Human Resources as the Director of the Western North Carolina Alcoholic Rehabilitation Center from June, 1974 to July 31, 1977. In January of 1977, James B. Hunt became

Governor of the State of North Carolina. He appointed the Defendant, Morrow, Secretary of the North Carolina Department of Human Resources.

Upon taking office in 1977, Governor Hunt designated 868 job positions within State government as exempt from the tenure provisions of the State Personnel Act. The job positions had been previously designated as "permanent" and within the protective provisions of the State Personnel Act.

Later in that same year, the North Carolina General Assembly with the urging and support of the Hunt Administration amended the State Personnel Act to exempt from the coverage of the Act all State employees with less than five years continuous service.

As a result of the foregoing actions, numerous state employees and seventy two of the one hundred thirty employees of the Western North Carolina Alcoholic Rehabilitation Center were exempted from the protection of the North Carolina State Personnel Act.

These actions by the Hunt Administration and the General Assembly were vigorously criticized in the news media throughout the State as being unwise and politically motivated.

Several medical employees at Western North Carolina Alcoholic Rehabilitation Center resigned as a direct result of these policy changes, and employee morale declined.

Petitioner became concerned that the personnel problems brought on by the recent policy changes were affecting patient care. He brought

these problems to the attention of his immediate superior, Dr. Greer, and the State Director of Mental Health, Dr. Zarzar. They responded that they could do nothing about the policies. He then raised the issue with Secretary Morrow and was, again, informed that the policies would not be changed.

Petitioner's concerns about the personnel policies continued, and on July 8, 1977 he called a press conference to urge Governor Hunt to restore protection to State employees who had been exempted from the State Personnel Act.

Prior to the press conference Petitioner received a telephone call from a reporter for the Morganton News Herald. Petitioner made a statement to the reporter and responded to the reporter's questions pertaining to the

recent controversy about the personnel policies of the Hunt Administration. The comments made by Petitioner in this telephone interview were the subject of a lengthy article which appeared in the Morganton News Herald on the same day.

At the press conference Petitioner made a statement to the reporters present and answered their questions relating to Hunt Administration personnel policies and also voiced his criticism of those policies.

Some two weeks after the press conference, Secretary Morrow telephoned the petitioner, and after mentioning the press conference, informed him that he would be terminated as Director of Western North Carolina Alcoholic Rehabilitation Center, effective July 31, 1977.

Secretary Morrow testified that she had terminated the Petitioner because he held a press conference during which he criticized Governor Hunt and the personnel policies of the Hunt Administration.

The Court of Appeals held that Petitioner's termination was lawful because he "was speaking not as a citizen contributing to public debate on 'matters of public concern' but as an employee dissatisfied with his employers' employment policies and seeking to further his private interest in his personal job status." The Court of Appeals cited Cooper v. Johnson, 590 F 2d 559, 561-562 (4th Cir. 1979) in support of its holding.

Petitioner respectfully contends that his case is not reasonably comparable to Cooper, and that he was

terminated by Secretary Morrow solely because he exercised his First Amendment right to comment on a matter of significant public concern and debate.

REASONS FOR GRANTING THE WRIT

1) The FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

The decision below directly conflicts with the principles in this Court's rulings in Pickering and Connick.

In Pickering, this Court held that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. In so doing the Court established a process by which "... a balance between the interests of

the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees ..."may be struck, 391 U.S. at 568.

The initial inquiry as outlined in Pickering, and Connick, concerns whether or not the content, form, and context of a given statement, as revealed by the whole record, establish that the statement addresses a matter of public concern. In the event that a review of these factors reveals that the statement in question addressed a matter of public concern, then the Court must weigh the interests of the employee against those of the State to determine if the action taken by the State was justified.

The record in this case clearly establishes by content, form, and context that the expressions of the Petitioner which resulted in his termination addressed a matter of public concern. The Court of Appeals, however, held that Petitioner's "... comments to the news media fell without the parameters of protected speech."

The action of the Court of Appeals in this case would establish a rule which broadens the initial inquiry described in Pickering, and Connick. Generally, the rule enunciated by the Court of Appeals in this case is that when an employee speaks on a matter of public concern which may be of personal interest to him, he will not be afforded First Amendment protection.

By establishing that an employee may not speak on a matter of public

concern if the matter would also be of personal interest to him, the Court of Appeals has set apart a significant area of government operation as being immune from public comments by government employees.

The controversy addressed by the Petitioner in this case involved the broad question of political patronage in State employment. This subject was addressed by the Court in CSC v. Letter Carriers, 413 U.S. 548 (1973) wherein it concluded that there is concern in this country as to whether government employment should depend upon meritorious performance rather than political affiliation.

Public management employees, such as the Petitioner, are the citizens who are most likely to have firsthand knowledge of the effect of politically

motivated personnel policies upon the efficient delivery of State services. Therefore, the rule applied by the Court below would have a chilling effect upon public debate on this important subject.

This Court has addressed this issue in Connick; however, the Court of Appeals apparently failed to comprehend the suggestion of the Court in Connick, that matters of public concern and personal interest may be the subject of comment by public employees without fear of retribution by their employer.

2) THE FEDERAL QUESTION HEREIN HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT

As previously pointed out, the holding in this case taken in the light of the record before the Court below establishes an overly restrictive rule

which would apply when an employee speaks on a matter of public concern which may directly affect his employment status.

In Connick this Court suggested that if the subject matter of the statement in question dealt with "...matters only of personal interest..." action taken against the employee by the public agency because of the expression would not be a proper subject of Federal Court inquiry.

Petitioner contends that this case provides an excellent opportunity for this Court to expand its discussion of this issue in order that free expression related to personnel matters in government may not be excluded from public debate.

3) THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE

DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER

In holding that the Petitioner is not entitled to First Amendment protection, the Court of Appeals has departed from the procedure applied by other Courts in similar fact situations.

At least three circuits have addressed cases in which a governmental employer discharged an employee for expressions on a matter of public concern in which the employee had a personal interest.

Those cases are McKinley v. City of Eloy, 705 F.2d 110 (9th Cir. 1983); Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983); and Gieringer v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973).

In the aforementioned cases the approach of the Court was consistent with Pickering and Connick. Upon determining that the employee's expression addressed a matter of public concern, the Court proceeded to weigh the factors described by this Court in those cases.

In McKinley the Court defined the speech which is not protected by the First Amendment as speech that "...deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies." 705 F.2d 1114.

As previously stated the holding of the Court below pertaining to the speech of the Petitioner does not indicate that the principles contained

in the aforementioned definition were applied.

It is respectfully submitted that the holding of the Court of Appeals in this case conflicts with the holdings of other Courts of Appeals on the same or similar issues as examplified by the aforementioned decisions.

4) THE DECISION OF THE COURT OF APPEALS IN THIS CASE SANCTIONED A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

The Court of Appeals affirmed the decision of the District Court and relied in part upon the reasoning of the District Court with regard to Petitioner's First Amendment claim.

In its Memorandum Decision the District Court reasoned that the Petitioner's speech was not protected because it was bickering and reflected

a running dispute with his employer. To support this holding the District Court cited Petitioner's dissatisfaction with the method of treatment for alcoholics favored by Secretary Morrow and Governor Hunt. The District Court found this to be "one of the primary reasons" for Petitioner's objection to being classified as exempt from the State Personnel Act.

No evidence of this dispute was presented during the trial of this case. All of the evidence by Petitioner and Respondents produced at the trial shows that the dispute that gave rise to Petitioner's termination dealt solely with the personnel policies of the Hunt Administration.

The treatment of this issue by the District Court was endorsed by the

Court of Appeals. Both Courts below relied heavily upon this reasoning in rejecting the Petitioner's claim.

It is fundamental that a finding of fact must be supported by evidence; yet this important finding by the District Court is unsupported by any evidence.

Petitioner submits that the foregoing represents a substantial departure from accepted practice, the effect of which was partially determinative in the lower Court's treatment of Petitioner's First Amendment claim.

CONCLUSION

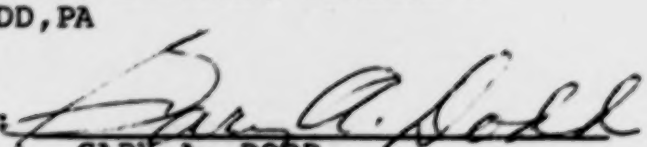
Certiorari is required in this case so that the law involving the issues hereinbefore raised may be settled and the Petitioner may receive treatment consistent with the treatment

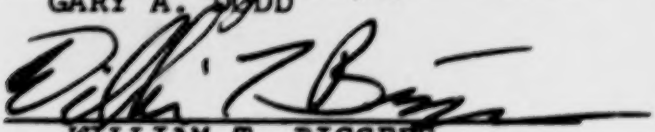
afforded public employees in cases with similar facts before other Circuit Courts and this Court.

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari, and summarily reverse the judgment below.

Respectfully submitted,

SNYDER, LEONARD, BIGGERS & DODD, PA

By: 
GARY A. DODD

By: 
WILLIAM T. BIGGERS

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2183

HERBERT F. MOORE,

Appellant,

versus

SARAH T. MORROW, Individually and as Secretary of Human Resources; The North Carolina Department of Human Resources,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

The Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Ervin and Judge Butzner.

For the Court

S/John M. Greacen

CLERK

FILED: AUGUST 1, 1984

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2183

Herbert F. Moore,

Appellant,

v.

Sarah T. Morrow, Individually and as Secretary of N.C. Department of Human Resources; The North Carolina Department of Human Resources,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W.

Jones, District Judge. (C/A A-C-81-288)

Argued: May 7, 1984 Decided: July 5, 1984

Before SPROUSE and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Gary Dodd (William T. Biggers, Snyder, Leonard, Biggers & Dodd on brief) for Appellant; Jack Cozort (Herbert L. Hyde; Rufus L. Edmisten, Attorney General of North Carolina; Ann Reed, Special Deputy Attorney General on brief) for Appellees.

PER CURIAM:

Herbert F. Moore, formerly the director of the Western North Carolina Alcoholic Rehabilitation Center (ARC), brought this action against Sarah T. Morrow, individually and as Secretary of the North Carolina Department of Human

Resources, and against the Department itself. [1]

Moore was discharged in 1977 after he openly criticized North Carolina Governor Hunt for, among other things, designating Moore's position with the ARC as "policymaking" and thereby excluding it from certain procedural safeguards outlined in North Carolina's State Personnel Act, N.C. GEN. STAT. 126-1 to -68 (1981) (the Act). Moore alleged in his complaint that he was discharged (1) for partisan political reasons, (2) without procedural due process in violation of the fourteenth amendment, and (3) in violation of his first amendment right to express his views on matters of public concern. After a jury trial, the District Court

[1]North Carolina Governor James B. Hunt was dismissed as a party defendant by agreement of all parties shortly before trial.

directed a verdict against him on all three claims. Moore, conceding that he was not fired for political reasons, does not appeal from that part of the directed verdict. He challenges in this appeal the District Court's directed verdict against him on his procedural due process and freedom of speech claims. We affirm.

Moore was employed in his ARC position by the State of North Carolina in June 1974. At that time the Act contained no provisions for tenure for state employees; consequently, Moore's employment was terminable at will and he had no property interest in his position to be protected by the fourteenth amendment. The North Carolina legislature amended the Act, effective February 1, 1976, to provide job protection to "permanent" state

employees, but exempted certain higher ranking personnel and "agency heads or other employees, by whatever title, that serve in policy-making positions, such positions to be designated by the Governor or by each elected department head in a letter to the State Personnel Director...." 1975 N.C. Sess. Laws, c. 667, sections 8,9, codified at N.C. GEN. STAT. 126-5 (d) (4) (1981). The Act was amended again in 1977 to remove all state employees with less than five years' continuous service from the category of "permanent employee". 1977 N.C. Sess. Laws c. 866, sections 2-5, codified at N.C. GEN. STAT. S 126-5 (d) (1981). Moore at the time of this amendment had less than five years' service with the state. The Act also provides a procedural mechanism by which an employee can appeal an

executive decision that his or her position is policy-making and therefore exempt from the Act's procedural protections. N.C. GEN. STAT. 126-5 (f) (1981).

Three-and-a-half months after his inauguration in January 1977, Governor Hunt designated 868 positions in state government, including Moore's, as policy making positions exempt from the Act, based on recommendations from the heads of various state departments.

Moore made no effort to pursue his statutory prerogatives to challenge in an administrative proceeding the Governor's designation of his job as policy making.On several occasions, however, he evinced his disagreement with the Governor's decision. His protests took a variety of forms, including a letter directed to Morrow,

his ultimate supervisor, in which he questioned the wisdom of the Governor's decision and to which he received no response. On June 27, 1977, Moore met personally with Mcrrow and informed her of his views on Governor Hunt's policies; she in turn apprised him that the Governor intended to stand firm.

On July 8, 1977, Moore granted a telephone interview to a reporter for the Morganton (North Carolina) News Herald, during which he stated, inter alia, "I contend that (Governor Hunt) is either dishonest or ignorant. If what he is doing is for politicial purposes, then I think it's dishonest. If he truly believes this is the way to improve the efficiency of state government, then I think it's ignorant". Moore's comments appeared in a front page article in the July 8, 1977

edition of the News Herald. Moore also held an 11:00 a.m. press conference that same day at the ARC in Black Mountain, North Carolina, during which he repeated this statement to reporters and added that the Governor was acting unwisely and without regard for the efficient operation of the ARC, About two weeks later, Morrow telephoned Moore and told him he was being discharged effective July 31, 1977. Formal notification of his discharge came soon afterwards. This lawsuit followed.

We consider first Moore's fourteenth amendment due process claim. He argues that he has a property interest in his state employment and that therefore the state could not discharge him without affording him due process of law. Specifically, Moore

reasons that non-policy-makers under the North Carolina statute have constitutionally protectable property interests, and that he is not a policy maker as that term is defined in Branti v. Finkel, 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S. 347 (1976). Moore's reasoning rests on infirm foundations. Branti and Elrod concern the first amendment right of state employees who are not policy makers not to be discharged because of their political affiliations. Moore, however, has conceded that this is not a "political firing" case because he was discharged for reasons other than his political affiliation. Elrod excepted policy makers from first amendment protection in political firing cases and defined that term in that context. In a fourteenth

amendment property right context, however, no employee, policy maker or otherwise, has a protectable property interest in his or her position unless that state endows that position with attributes generating such an interest. See Bishop v. Wood, 426 U.S. 341, 344-47 (1976). In deciding whether Moore has a constitutionally protected property interest in his position, then we must look to the law of North Carolina to determine whether the state has accorded employees like Moore a property interest in their state employment. After reviewing the characteristics of Moore's position at the ARC as defined by state law, we agree with the District Court that Moore had no state-created property interest in his employment that was protected by the fourteenth amendment.

The first amendment free speech claim presents a closer question, but we conclude that Moore was not discharged for uttering protected speech. Regardless of the existence of a property interest in his ARC employment, Moore had a right not to be discharged for engaging in speech protected by the first amendment. We conclude, however, that Moore's comments to the news media fell without the parameters of protected speech as defined by the Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968).[2] Pickering held that a public employee's interest as a citizen in commenting on matters of public concern must be balanced against

[2]Whether a state employee's public comments are protected speech is a question of law. Connick v. Myers, ___ U.S. ___, 75 L. Ed. 2d 708, 720 (1983)

the state's interest in promoting the efficiency of the public services it performs through its employees. Id. at 568. Moore, acting in his official capacity as director of the ARC, held a press conference during working hours on state property and focused his criticisms on Governor Hunt personally. It is clear from the time, place, and manner in which Moore chose to voice his criticism of Hunt that he was speaking not as a citizen contributing to the public debate on "matters of public concern" but as an employee dissatisfied with his employer's employment policies and seeking to further his private interest in his personal job status. See Cooper v. Johnson, 590 F. 2d 559, 561-62 (4th Cir. 1979).

We, therefore, affirm the judgment of the District Court on the reasoning articulated in its memorandum decision. Moore v. Morrow, No. A-C 81-288 (W.D.N.C. Nov. 21, 1983).

AFFIRMED

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION
A-C-81-288

HERBERT F. MOORE, Plaintiff, v. SARAH T. MORROW, individually and as Secretary of N.C. Department of Human Resources; JAMES B. HUNT, JR., Individually and as Governor of the State of North Carolina; and THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, Defendants.	MEMORANDUM OF DECISION

The Plaintiff, Herbert F. Moore, brought this civil action against Defendants, Dr. Sarah T. Morrow, individually and as Secretary of the North Carolina Department of Human Resources and James B. Hunt,

individually and as Governor of North Carolina, and the North Carolina Department of Human Resources. He seeks injunctive relief and monetary damages for alleged violations of his civil and constitutional rights under the First and Fourteenth Amendments and 42 U.S.C.A. 1983. This Court originally granted Defendants' motion to dismiss pursuant to F.R.Civ.P. 12(b)(6). On appeal the Court of Appeals for the Fourth Circuit reversed the dismissal. Subsequent to the Court of Appeals' remand the Defendants' motion for summary judgment was denied and the case was scheduled for trial. Prior to trial the parties stipulated that the Plaintiff's claim as to Defendant James B. Hunt, Jr., individually and as Governor of the

State of North Carolina would be dismissed.

The case was tried before a jury in Asheville, North Carolina on October 17, 1983. At the close of all of the evidence the Defendants moved for a directed verdict pursuant to F.R.Civ.P., Rule 50. After a careful consideration of the pleadings, evidence, briefs and arguments of counsel the Court granted the Defendants' motion. Viewing the evidence and inferences most favorably to the Plaintiff as is required where the Defendant moves for a directed verdict the Court now enters its findings and conclusions. See, Phoenix Savings & Loan, Inc. v. Aetna Casualty & Sur. Co., 427 F.2d 862 (4th Cir. 1970).

Plaintiff was hired by the North Carolina Department of Human Resources as Director of the Western North Carolina Alcoholic Rehabilitation Center (hereinafter ARC) in Black Mountain, North Carolina effective June 18, 1974. At the time Plaintiff was hired to fill this position James E. Holshouser was the Republican Governor of North Carolina. Plaintiff continued his employment as Director of the ARC without incident, receiving merit and annual salary increases, through June 1977.

Plaintiff was originally hired as a "permanent" employee as opposed to a "temporary" employee. In 1974 when Plaintiff was hired it was well settled that employees of the State of North Carolina had no property interest in their jobs since no tenure system

existed under North carolina law at the time. However the State Personnel Board was empowered to hear appeals of employees and issue advisory recommendations. N.C.G.S. 126-4 (1965). In 1975, the State Personnel Act was amended, effective February 1, 1976, to provide that permanent employees, subject to the Act, would not be discharged, suspended or reduced in pay, except for just cause. N.C.G.S. 126-35 (1976). The State Personnel commission was given authority to hear appeals and to isssue binding orders concerning, inter alia, employee discharges. In addition, certain employees were made exempt from the Act's coverage, including:

> Other deputies, administrative assistants, division or agency heads or other employees, by whatever title, that serve in policy-making positions, such

> positions to be designated by the Governor or by each elected department head in a letter to the State Personnel Director, the Speaker of the North Carolina House of Represenatives, and the President of the North Carolina Senate by May 1 of the year in which the oath office is administered to each Governor;...
> N.C.G.S. 126-5(b) (3) (1976).

The 1975 Amendments also provided that "career employees" whose positions were exempted from the Personnel Act by the Governor pursuant to N.C.G.S. 126-5(b) would be given "all possible assistance in being appropriately relocated in State Government". N.C.G.S. 126-5(c) (1976). "Career employees" were defined as those persons who had been employed by the State for five consecutive years. N.C.G.S. 126-5(e) (1976).

The State Personnel Act was amended again in 1977. The 1977

Amendment provided that State employees who had not been continuously employed by the State for the five preceding years were exempt from the Act's coverage with certain exceptions not here relevant. N.C.G.S. 126-5(d) (1) (1977). The 1977 Amendment also contained a provision giving the Governor authority to exempt policy-making positions from the Act's coverage. N.C.G.S. 126-5(d) (4) (1977).

James B. Hunt, Jr. was elected Democratic Governor of North Carolina in 1976. He took the oath of office on January 8, 1977. Shortly thereafter he appointed Defendant Morrow as Secretary of the Department of Human Resources. After his inauguration Governor Hunt with the recommendations of his Department heads , designated a total

of eight hundred sixty-eight (868) positions in State government, including Plaintiff's position, as policy-making positions and exempt from the State Personnel Act. Classification of their positions as exempt from the State Personnel Act was a source of consternation and dissatisfaction to many employees. Plaintiff thought that the personnel policies of Governor Hunt were having a demoralizing effect on his staff at the ARC and therefore wrote letters to Defendant Morrow and others to express his concern. He also voiced his concern regarding Governor Hunt's personnel policies to Defendant Morrow personally. Defendant Morrow told the Plaintiff that he would just have to live with the decision of the Governor. Thereafter, on July 8, 1977, the

Plaintiff held a press conference during which he was critical of the personnel policies of Governor Hunt. On July 22, 1977 Plaintiff received a telephone call from Defendant Morrow whereby she informed him that he was being terminated as Director of the ARC effective July 31, 1977. Plaintiff's discharge was precipitated, at least in part, by remarks he had made to the press. Plaintiff made no attempt to appeal to the State Personnel Commission. The Court concludes that as a matter of law there was in sufficient evidence for a jury to find that the Plaintiff was discharged for political patronage reasons. Therefore the Defendants' motion for directed verdict as to Plaintiff's claim that he was discharged for political patronage reasons should be granted.

The Court further concludes that the Defendants' motion for directed verdict as to Plaintiff's claim that he was denied due process should be granted because the Plaintiff had no property interest in his job. Plaintiff admits that he had no property interest in his job when he was originally hired in 1974. He contends that the 1975 Amendments to the State Personnel Act gave him a property interest in his job. Plaintiff argues that once he had a vested property interest in his continued employment neither the North Carolina Legislature nor the Governor could act unilaterally to divest him of that property interest. The Court agrees with Plaintiff's argument that a vested property interest can not constitutionally be divested by statute.

At issue here is whether Plaintiff ever acquired a vested right in continued state employment. State law must be considered to determine whether one has a protected property interest in State employment. Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). It appears to the Court that Plaintiff never acquired a vested property interest in his State employment by law or regulation. Only those employees subject to the State Personnel Act acquired property interests in their positions. Plaintiff, as ARC Director, filled a position which was in the category of "division or agency heads or other employees, by whatever title, that serve in policy-making positions," N.C.G.S. 126-5(b)(3) (1976). Therefore Plaintiff had no legitimate

expectation that his position would not be exempted from the Personnel Act's coverage by future governors. Further, in 1976 Plaintiff had not been employed by the State for more than five consecutive years and therefore he could not expect to be given assistance in being relocated in State government should his position be exempted from the Personnel Act's coverage. N.C.G.S. 126-5(c) and (e) (1976). Plaintiff cites Faulkner v. Dept. of Corrections. 428 F.Supp. 100 (W.D.N.C. 1977) in support of his argument that the 1975 Amendments to the State Personnel Act gave him a vested property interest in his State employment. Faulkner differs from this case in one critical respect. In Faulkner the Plaintiff was employed as Field Service Counselor in the Adult Probation and Parole Division of the

Department of Corrections. Faulkner therefore was not an agency head as is the Plaintiff in the instant case.

Plaintiff's final claim is that his dismissal was in violation of his constitutionally guaranteed right to free speech. The Court has determined that, as a matter of law, Plaintiff's speech was not protected by the First Amendment. Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981). Specifically, during the press conference the Plaintiff stated that "I contend that he (Governor Hunt) is either dishonest or ignorant. If what he is doing is for political purposes, then I think it's dishonest. If he truly believes this is the way to improve the efficiency in State government, then I think it's ignorant". Plaintiff also stated that Governor

Hunt was "holding a club over the heads of key staff people in an attempt to rule them through fear". The Court finds and concludes that this speech lies outside the scope of constitutionally protected speech and is akin to the sort of bickering and running disputes with department heads found not to be protected in English v. Powell, 592 F.2d 727 (4th Cir. 1979), and Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972). The Court concluded in English v. Powell, supra, citing Chitwood v. Feaster, supra, that "A(n employer) has a right to expect a(n employee) to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he

does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized". 468 F.2d at 360-3.

The evidence clearly shows that the Plaintiff was dissatisfied with the method of treating alcoholics favored by Defendant Morrow and Governor Hunt. Plaintiff favored the medical model of treating alcoholics while Defendant Morrow and Governor Hunt favored the Alcoholics Anonymous model. Plaintiff's and Defendant's disagreement concerning which model to use was one of the primary reasons Plaintiff disfavored the establishment of his position as exempt from the State Personnel Act. The fact that Plaintiff made public his disagreement with the policies of his employer does not entitle him to greater First

Amendment protection than he would have had had he simply privately voiced his disagreement to his employer.

Even if it were assumed that the Plaintiff's speech was constitutionally protected, the balancing of the Plaintiff's right as a citizen in commenting on matters of public concern and the State's interest in promoting the efficiency of public services required by Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), weighs against the Plaintiff for the reasons stated by the Court in its Memorandum of Decision entered May 25, 1982. Based on the foregoing reasons the Court holds that Defendant Morrow's motion for Directed Verdict should be granted. A judgment dismissing the action will be entered simultaneously herewith.

This the 18th day of November, 1983.

S/ Woodrow W. Jones

Chief Judge

NO. 84-738 (2)

IN THE

Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

OCTOBER TERM, 1984

HERBERT F. MOORE,
Petitioner,

v.

SARAH T. MORROW, INDIVIDUALLY AND AS SECRETARY OF N.C. DEPARTMENT OF HUMAN RESOURCES; THE N.C. DEPARTMENT OF HUMAN RESOURCES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HON. LACY H. THORNBURG
Attorney General of North Carolina
Ann Reed
Special Deputy Attorney General
Post Office Box 629
Raleigh, N.C. 27602-0629
(919) 733-4618
Herbert L. Hyde
Attorney at Law
Post Office Box 7266
Asheville, North Carolina 28807

COUNSEL FOR RESPONDENTS

18

QUESTION PRESENTED

Were comments of the director of a state-supported institution, which characterized the Governor of the State of North Carolina as either ignorant or dishonest, protected by the First Amendment to the Constitution of the United States?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT

1) THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR DIRECTED VERDICT WAS IN ACCORD WITH APPLICABLE LAW. THEREFORE, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT IS CORRECT, AND A WRIT OF CERTIORARI SHOULD NOT ISSUE 5

2) THE FEDERAL QUESTION HEREIN HAS PREVIOUSLY BEEN SPECIFICALLY DETERMINED BY THIS COURT 10

3) THE DECISION OF THE DISTRICT COURT WHICH WAS AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER . 10

4) THE DECISION OF THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT 12

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 8, 11, 12

Cooper v. Johnson, 590 F. 2d 559 (4th Cir., 1979) 7

English v. Powell, 592 F. 2d 727 (4th Cir., 1979) . 12

Gieringer v. Center School District No. 58, 477 F. 2d 1164 (8th Cir. 1973) 11

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 7

Leonard v. City of Columbus, 705 F. 2d 1299 (11th Cir., 1983) 11

McKinley v. City of Eloy, 705 F. 2d 1110 (9th Cir. 1983) 11

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 5, 7, 8, 10, 11, 12

United States Civil Service Commission v. Letter Carriers, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) 9

NO. 84-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HERBERT F. MOORE,
Petitioner,

v.

SARAH T. MORROW, INDIVIDUALLY AND AS SECRETARY OF N.C. DEPARTMENT OF HUMAN RESOURCES; THE N.C. DEPARTMENT OF HUMAN RESOURCES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

On June 18, 1974 Herbert Moore, Petitioner herein, was hired by the North Carolina Department of Human Resources as Director of the North Carolina Alcoholic Rehabilitation Center in Black Mountain, North Carolina. At the time Moore was hired, he was hired as a "permanent employee," as opposed to a "temporary employee." Moore was employed at a time when the State Personnel Act in effect was undergoing considerable change and evolution. The State Personnel Act in effect at the time Moore was hired gave the State Personnel Board the power to hear appeals of applicants, employees, and former employees and to issue advisory opinions in appeal cases. No tenure system existed under North Carolina law at the time

Moore was hired. Therefore, at the time he was employed, Moore's employment was terminable at the will of the North Carolina Department of Human Resources.

In 1975, the North Carolina General Assembly amended the State Personnel Act, effective February 1, 1976, to provide that "permanent employees" were entitled to proceed through an appeal procedure to challenge disciplinary or dismissal actions, giving the State Personnel Commission the right of "investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate actions concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified." NCGS 126-4 (1976).

The North Carolina General Assembly provided in that same Act in 1975, effective February 1, 1976, that employes "that serve in policy-making positions, such positions to be designated by the Governor or by each elected Department Head in a letter to the State Personnel Director, The Speaker of the House of Representatives, and the President of the North Carolina Senate by May 1 of the year in which the oath of office is administered to each Governor" shall not have the right of appeal to the State Personnel Commission to challenge disciplinary or dismissal actions. NCGS 126-5 (1976).

James B. Hunt, Jr., was administered the oath of office as Governor of North Carolina on January 8, 1977. In a letter dated April 29, 1977, addressed to the State Personnel Director, The Speaker of the House of Representatives and the President of the North Carolina Senate, Governor James B. Hunt, Jr., designated 868 positions within the nine departments

under his control as policy-making positions. The Petitioner's position as Director of the North Carolina Alcoholic Rehabilitation Center in Black Mountain was one of those positions designated as policy-making.

In 1977, the North Carolina General Assembly further amended the State Personnel Act to provide that the right to a binding appeal before the State Personnel Commission on the question of dismissals shall not apply to "an employee of the State of North Carolina who has not been continuously employed by the State of North Carolina for the immediate five proceeding years. NCGS 126-5 (1977).

The changes in the State Personnel Act, and the enforcement of those laws by Governor Hunt resulted in a great deal of public debate. Moore, who was affected by the changes in the personnel laws, voiced his concern about the changes to his supervisors, including Sarah T. Morrow, Secretary of the Department of Human Resources under Governor Hunt. On one occasion, Moore wrote to Dr. Morrow expressing his concern. Moore was not fired for writing that letter. Later in the month of June, 1977, Moore voiced his concerns personally with Dr. Morrow at a meeting in Raleigh. He was informed by Dr. Morrow that she had discussed the policies with the Governor and that the decision of the Governor was final. Moore was not fired at this time.

On July 8, 1977, Moore held a press conference in the Activities Room of the Alcoholic Rehabilitation Center, during his regular working hours. The purpose of the press conference was to criticize the changes in the State Personnel laws and their enforcement by Governor Hunt. Prior to the press conference Moore told a newspaper reporter for publication: "I contend that he (Hunt) is either dishonest or ignorant. If what

he is doing is for political purposes, then I think it's dishonest. If he truly believes this is the way to improve the efficiency in state government, then I think it's ignorant."

Secretary Morrow read the newspaper accounts of Moore's press conference and his statements about Governor Hunt. About two weeks after the press conference, Secretary Morrow telephoned Moore and informed him that he was being terminated as Director of the Alcoholic Rehabilitation Center, effective July 31, 1977. Only July 24, 1977, Moore received a written notice of his termination. At trial, Secretary Morrow stated that Moore was terminated because of the statements he made about the Governor: "He had said that the Governor was either dishonest or ignorant, and when I read some of the things that had been stated, I realized that this man's loyalties and his attitude towards this administration would make it impossible for us to carry out a good relationship, and to carry out the programs and policies of the administration."

Moore brought this action against Dr. Sarah T. Morrow, Individually and as Secretary of the North Carolina Department of Human Resources, and James B. Hunt, Jr., Individually and as Governor of North Carolina, and the North Carolina Department of Human Resources. He alleged that these Defendants wrongfully dismissed him for exercising his First Amendment Right to Speech. Immediately before the trial of the action, Moore dismissed the action against Governor James B. Hunt, Jr.

The case was tried before a jury in Asheville, North Carolina on October 17, 1983. At the close of all the evidence, the District Court granted Defendants' motion for a directed verdict pursuant to F.R. Civil Procedure 50. Moore appealed the granting of that

motion and the District Court's dismissal of the action to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court.

ARGUMENT

1) THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR DIRECTED VERDICT IS IN ACCORD WITH APPLICABLE LAW. THEREFORE, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT IS CORRECT, AND A WRIT OF CERTIORARI SHOULD NOT ISSUE.

The leading case on discharge for exercise of First Amendment rights is *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). In *Pickering*, the Court applied a balancing test between the interests of the employee in commenting upon matters of public concern and the interests of the State in promoting the efficiency of public services it performs through its employees. Some of the variants the Court examined include the hierarchical proximity of the criticizing employee to the person or body criticized, the potential disruptive effect or harm caused by the statements, the degree of general public interest in the subject of the statements, whether the fact of the employee's position creates a presumption of greater access of facts related in the statements, and whether the statements are likely to impede the employee's proper performance of his daily duties. 391 U.S. 569-573.

The uncontroverted facts in this case are that, following his designation as an exempt employee,

petitioner called a press conference on July 8, 1977, as Director of the ARC, and publicly stated in a separate interview with the press that the Governor had abused the law in exempting positions at the ARC and that "I contend that he (Hunt) is either dishonest or ignorant. If what he is doing is for political purposes, then I think it's dishonest. If he truly believes this is the way to improve efficiency in State government, then I think it's ignorant." During the press conference, petitioner stated his views on the new tenure system for State employees, and was critical of this system. The press conference was called by petitioner during his working hours on the grounds of the ARC, a State-operated facility which treats alcoholics in need of custodial care.

The statements made by petitioner in the press conference and in separate interviews with the press were not related to the care and treatment of alcoholics.

As Director of the Western North Carolina ARC, Petitioner was charged with the day-to-day administration and supervision of the alcoholic rehabilitation program and detoxification unit for 35 counties of Western North Carolina. He supervised approximately 130 employees at the ARC.

The State of North Carolina provides funds to the Department of Human Resources for the treatment of alcoholics at regional rehabilitation centers.

During her tenure as Secretary of the Department of Human Resources, Respondent Sarah Morrow was responsible for the management of all of the ARC's in North Carolina, including the Western North Carolina ARC. Dr. Morrow was appointed to her position by former Governor Hunt, pursuant to his statutory authority. Dr. Morrow's link with the staff and patients at the ARC's was the director of each of these centers.

The relationship between Petitioner and Respondents was one which called for a significant degree of loyalty. While respondent Morrow and former Governor Hunt were by law ultimately responsible for the management of the ARC at the time in question, they depended on the director of the ARC to carry out their directives. Common sense dictates that Respondents should not have been forced to depend on an individual to carry out their directives who has publicly attacked their honesty and integrity.

The *Pickering* test also weighed the relationship between the employee's position and the subject matter of the speech. Petitioner's employment was central to the subject matter of his speech. Clearly, petitioner was not speaking as a mere member of the public, but as Director of the ARC and as an employee directly affected by the statutes he was criticizing.

Thus, while petitioner enjoyed the right to speak out on the issue of the tenure system, his freedom of speech was not absolute—he did not have the right to speak out on this issue anywhere at any time. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). In *Cooper v. Johnson*, 590 F. 2d 559 (4th Cir., 1979), the Fourth Circuit stated, "In all, the issue is whether he spoke out as an employee or as a member of the public." 590 F. 2d at 561.

Petitioner's evidence indicates that he spoke out as Director of a State facility, not as a member of the public. His statements were not made on his own time but on State time at a State facility. The comments were not related to his duties at the ARC, and yet he invited the press to the facility to hear his statements in spite of his obligation to strictly protect the identities of the patients at the ARC. Clearly petitioner's relationship with the targets of his speech was a working relationship for which personal loyalty and

confidence were necessary. The statements, under the circumstances, would and did tend to foment controversy and conflict at the ARC.

Thus, Petitioner spoke out at a place, time and under circumstances which clearly could interfere with the operation of the ARC. Therefore, the *Pickering* balance must be struck in favor of the State's interest in promoting "the efficiency of the public services it performs through its employees." 391 U.S. at 568.

A recent decision of the Supreme Court strongly supports the trial court's ruling. In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 75 L. Ed. 2d 708 (1983), the Court concluded that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 75 L. Ed. 2d at 723.

The Supreme Court in *Connick* also closely examined the manner, time and place in which the questionnaire at issue was distributed. The Court concluded that "the fact that Myers, unlike Pickering, exercised her right to speech at the office supports Connick's fears that the functioning of his office was endangered." 75 L. Ed. 2d at 724. Here again the situation is parallel, since Petitioner Moore made his statements while he was on duty as Director of the ARC, and made the statements on the grounds of the ARC.

The final factor discussed by the Court was the context in which the dispute between Myers and Connick arose. "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the

speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 75 L. Ed. 2d at 724. Moore's criticisms of the Governor concerned policies which directly affected his own employment, and for this reason, Respondents contend that their position is entitled to extra weight, as stated by the Supreme Court.

Respondent Morrow's testimony on her reasons for dismissing Moore is worth quoting again: "He had said that the Governor was either dishonest or ignorant, and when I read some of the things that had been stated, I realized that this man's loyalties and his attitude toward this administration would make it impossible for us to carry out a good relationship, and to carry out the programs and policies of the administration."

Moore simply went too far. He was allowed to disagree with the policies in writing, and he was allowed to voice his concerns directly to Morrow, without any form of retribution being taken against him. And, there may well have been circumstances under which he could have publicly voiced his concerns, in the proper manner and at the proper place, in a constitutionally protected fashion. This the Petitioner did not do. Instead, he said the wrong thing at the wrong time and in the wrong place. Therefore, as a matter of law, his statements are not entitled to First Amendment protection, and Respondents were entitled to a directed verdict on the First Amendment issue, as found by the District Court.

Plaintiff cites *United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973), as authority for his position. That case, however, dealt not with specific statements of a public employee, but with the rights of

public employees to engage in partisan political activities. The Court specifically quoted from *Pickering*, stating: "[T]he government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Thus, the decision of the District Court, which has been affirmed by the Court of Appeals, is consistent with prior holdings of this Court, and a writ of certiorari should not issue.

2) THE FEDERAL QUESTION HEREIN HAS PREVIOUSLY BEEN SPECIFICALLY DETERMINED BY THIS COURT.

As set out in this argument, *supra*, at Paragraph 1), the holding of the District Court, as affirmed by the Court of Appeals, is in accord with previous decisions of this Court on the federal questions before the Court. Therefore, a writ of certiorari should not issue.

3) THE DECISION OF THE DISTRICT COURT WHICH WAS AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

Petitioner cites three decisions from other circuits, as authority for his position that the decision of the District Court which was affirmed by the Court of Appeals for the Fourth Circuit, conflicts with decisions from other circuits on the same subject. Petitioner's

reliance on these cases is misplaced.

In *McKinley v. City of Eloy*, 705 F. 2d 1110, 1113 (9th Cir. 1983), the Ninth Circuit stated:

> "The initial question is whether the first amendment protected plaintiff against discharge for the type of speech in which he engaged."

The Court acknowledged that the question of which publications address issues of general or public interest is a question which must be decided on an ad hoc basis. The Court then applied the balancing test of *Pickering* and *Connick* and determined that the speech in question did address an issue of public concern.

In *Leonard v. City of Columbus*, 705 F. 2d 1299, 1303 (11th Cir. 1983), the Eleventh Circuit acknowledged that "Whether the conduct or speech is protected we determine by reference to the balancing test established by the Supreme Court in *Pickering*... [citation omitted]" Likewise, the Eighth Circuit, in *Gieringer v. Center School District No. 58*, 477 F. 2d 1164 (8th Cir. 1973), acknowledged that the question of whether speech is protected is the threshold inquiry and that the balancing test of *Pickering* must be applied by the Court in answering this question.

Thus, while the cases cited by Petitioner involve speech determined to be protected, unlike Petitioner's speech, that determination was made by applying the same test applied in Petitioner's case. Clearly the result in Petitioner's case was the correct and the common sense result—no employee, whether he is employed in the public or the private sector, should expect to be able to call his employer ignorant or dishonest in public with impunity.

Thus, the decision of the courts below is not in

conflict with the decisions of other circuits and a writ of certiorari should not issue.

4) THE DECISION OF THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

The District Court correctly determined that Petitioner was dismissed because he publically characterized the Governor of North Carolina, whose policies he was responsible for implementing, as being either ignorant or dishonest. Implicit in the opinion of the District Court is the rationale that under the balancing tests previously approved by this Court in *Pickering,* and recently affirmed in *Connick,* Petitioner's statements were outrageous statements which no employee should expect to make about his employer with impunity. The statements made by Petitioner were clearly, as the District Court stated, "bickering and running disputes" with his supervisors and were not issues of general or public concern. *English v. Powell,* 592 F. 2d 727 (4th Cir., 1979).

Therefore, while the evidence in the record on appeal supports the District Court's finding as to Petitioner's reasons for making his public statements, it is the nature of the statements and not the reason for making them that underlies the opinion of the District Court. Assuming that the District Court correctly determined that the statements were not entitled to protection as being "bickering and running disputes," as respondents contend, then clearly the decision of the Court of Appeals affirming that decision did not sanction a departure from accepted judicial proceedings. Therefore, the writ of certiorari should not issue.

CONCLUSION

For the reasons stated above, respondents assert that the petition for writ of certiorari should be denied.

Respectfully submitted this the 19th day of January, 1985.

LACY H. THORNBURG
Attorney General

Ann Reed
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Tel. No. (919) 733-4618

Herbert L. Hyde
Attorney at Law
Post Office Box 7266
Asheville, North Carolina 28807

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT was served upon counsel of record for the Petitioner by depositing this day a copy thereof with the United States Postal Service, first class postage prepaid, addressed as follows:

Gary A. Dodd
William T. Biggers
Attorneys at Law
Synder, Leonard, Biggers & Dodd, P.A.
274 Merrimon Avenue
Asheville, N.C. 28801

This 19th day of January, 1985.

Ann Reed
Special Deputy Attorney General